



**Before The  
State Of Wisconsin  
DIVISION OF HEARINGS AND APPEALS**

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City of West Bend, Complainant

vs.

Case No. 99-H-1119

Town of Barton, Respondent

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**FINAL DECISION**

The City of West Bend (City) applied for permission from the Town of Barton (Town) to construct a portion of a sewer main within the right of way of River Drive and Woodford Drive within the jurisdiction of the Town. The Town denied the request. On February 22, 1999, the City filed a Notice of Appeal with the Division of Hearings and Appeals pursuant to sec 86.16(5), Stats., requesting a hearing to review the Town's denial of the application.

Pursuant to due notice a hearing was held on June 4, 1999, in West Bend, Wisconsin. Mark J. Kaiser, Administrative Law Judge (ALJ), presiding. The parties filed written arguments after the hearing. The City filed its initial brief on June 21, 1999, the Town filed a response brief on July 6, 1999; and, the City filed a reply brief on July 13, 1999.

In accordance with secs 227.47 and 227.53(1)(c), Stats., the parties to this proceeding are certified as follows:

City of West Bend, by

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The ALJ issued a Proposed Decision in this matter on August 20, 1999. The Town of Barton filed objections to the Proposed Decision on September 1, 1999, and the City of West Bend filed comments in support of the Proposed Decision on September 2, 1999. The Town objected to findings related to the anticipated growth of the northern portion of the City of West

Bend and related to the City's efforts to eliminate the use of lift stations in its sanitary sewer system. The purpose of these findings is to explain the reasons that the City chose the route for the sanitary sewer system that it did. It is beyond the scope of this hearing to decide if the reasons are valid.

The Town also raises two objections to paragraph two of the Proposed Findings of Fact. The Town objects that no finding was made that the City changed its proposal with respect to the portion of the road right-of-way in which it intended to construct the proposed sanitary sewer on the day of the hearing. The Division of Hearings and Appeals makes its determination based upon the proposal presented to it. It is not clear why the Town is even raising this objection. If the point the Town is attempting to make is that if the City had presented this proposal to the Town prior to the hearing, the Town may have given its permission to construct the proposed sanitary sewer without the need for a hearing, that would have been nice for the parties. However, once the hearing was commenced, there is no reason for the City to not present a modified proposal that is more likely to gain approval. This makes more sense than requiring the City to stick to its original proposal and risk having to go through the hearing process twice.

The Town also objects that paragraph two makes no finding with respect to the "existence of a road right-of-way in this area." Presumably, the Town is arguing that a finding with respect to the *width* of the road right-of-way in this area should have been made. Such a finding arguably would be relevant to the feasibility of the City's proposal. The Town also objects to the lack of a finding regarding whether the City can meet the condition of keeping one lane of traffic open through the construction area during the period of construction. The ALJ found in the Proposed Decision that the proposed project will not constitute an unreasonable obstruction to traffic on the condition that the City maintain at least one lane of traffic through the construction area at all times. The ALJ indicated that it is not clear that the City will be able to satisfy this condition. If it cannot satisfy this condition for any reason, it does not have authority to construct the proposed sanitary sewer line within the limits of the Town roads.

The Town also objects to statements in the Findings of Fact that the Town was willing to give permission for the proposed construction if the City allowed the Town residents in the area to hookup to the sewer without having their property annexed to the City. The relevance of this objection is not clear. The fact that a hearing was conducted on this matter indicates that ultimately the Town was considered to have denied the City's request. However, the record does contain evidence that both the Town chairman and the Town's attorney indicated that the Town would give its approval for the project if the City agreed to hookup the Town residents.

The Town also objects to paragraph six. However, it is not clear what its objection is since the objection appears to paraphrase the findings in paragraph six.

The Town objects to the lack of findings in the decision relating to the length of time for construction of the portion of the project to be located within the Town roads. The Town argues that this finding is necessary to contrast the amount of obstruction to traffic from the City's proposal compared to the amount of traffic which would result from the alternatives proposed by the Town. The ALJ did state in the Discussion section of the Proposed Decision that the alternate routes proposed by the Town "would result in little or no obstruction of traffic" and if the goal was to "simply minimiz[e] the obstructions to traffic on public highways either of the alternate routes are obviously preferable to the route the City proposes." As stated in the

Proposed Decision, the issue is not whether the proposed project will minimize traffic disruption, but rather whether it will cause an unreasonable obstruction of traffic

The Town also objects to the condition imposed in the Order arguing that the Division of Hearings and Appeals does not have authority to order any sewer laterals to be capped. The Order does not require the sewer laterals to be capped but does allow the City to do so until the issue of hooking up the abutting property owners is resolved. As stated in the Decision, this reduces the amount of obstruction to traffic by eliminating the need for the City to tear up the road a second time for construction of laterals after it has completed the sewer project.

Finally, the Town argues that sec. 86.16, Stats., does not apply to the construction of sewer mains. This argument was adequately addressed in the Proposed Decision. The Town's objections are not persuasive and the Proposed Decision is adopted as the Final Decision in this matter.

### FINDINGS OF FACT

The Administrator finds

1. The City of West Bend (City) and the Town of Barton (Town) are located in Washington County, Wisconsin. The City is in the process of designing an addition to its sanitary sewer system that it refers to as the Northwest Interceptor. The Northwest Interceptor is planned to provide sewer service for recently annexed territory east of the Milwaukee River referred to as the Wink lands, to provide sewer service for the anticipated expansion of Moraine Park Technical College, to provide sewer service for anticipated growth of an area in the northern part of the City referred to as Young America, and to eliminate the Patricia Avenue lift station (Ex. 3).

2. The City proposes to construct a segment of the Northwest Interceptor within the right-of-way of River Drive and Woodford Drive. Specifically, the proposed sewer segment would begin at an existing sanitary sewer manhole in the intersection of Greentree Road and River Drive. It would follow River Drive northeasterly to Woodford Drive and then run easterly along Woodford Drive, cross the Milwaukee River and continue on Woodford Drive east of the Milwaukee River to Salisbury Road where it would serve a subdivision proposed to be developed on the Wink land.

3. River Drive and Woodford Drive are within the Town of Barton. By letter dated August 7, 1996, the City requested permission from the Town to construct the proposed sewer main within the rights-of-way of River Drive and Woodford Drive (Ex. 11). There was apparently no written response to the request; however, Kenneth Pesch, West Bend city engineer, noted in a memo to his file (exhibit 12) that Russ Abel, the Town Chairman for the Town of Barton, telephoned him on November 21, 1996, and informed him that unless some benefit would accrue to Town residents in the River Drive/Woodford Drive area the Town would not give its permission for the City to construct the proposed sewer within the right-of-way of the Town roads. The benefit to Town residents in the area that was suggested was allowing the residents to hook-up to the sewer without having their property annexed to the City.

4. The City renewed its request by letter dated February 11, 1997 (Ex. 12) and again in letters dated March 31, 1997 and June 11, 1997, from Mr. Yde to Mr. Andringa. By letter dated June 24, 1997, Mr. Andringa reiterated the Town's position that it would allow the City to construct the proposed sewer main within the right-of-way of Town roads on the condition that Town residents in the area be allowed to connect to the sewer system without being annexed (Ex. 4). The City found this condition unacceptable and on February 23, 1999, filed a request for hearing with the Division of Hearings and Appeals (DHA) pursuant to sec. 86.16(5), Stats.

5. The portion of the proposed Northwest Interceptor that will be within the right-of-way of Town roads is 2640 feet long. The first stretch runs from the intersection of Greentree Road and River Drive to the intersection of River Drive and Woodford Drive. This stretch is 1720 feet long and consists of 21-inch sewer pipe. The second stretch runs from the intersection of River Drive and Woodford Drive to manhole number 10 on Woodford Drive. This stretch is 400 feet long and includes a crossing beneath the Milwaukee River. This stretch consists of mixed 21-inch and dual 15-inch sewer pipe. The third stretch is 520 feet long and runs from manhole number 10 on Woodford Drive east to Salisbury Road. This stretch consists of 15-inch sewer pipe.

6. Eleven residences and one business are located along the stretch of River Drive and nine residences and one business are located along the stretch of Woodford Drive on which construction is proposed (Ex. 19). Access to the properties on River Drive and to properties on Woodford Drive west of the Milwaukee River is from the south via River Drive and from the west via Woodford Drive. Access to this area from the north and east is blocked by the Milwaukee River. A bridge on Woodford Drive across the Milwaukee River has been closed.

Railroad tracks run from the northwest to the southeast through this area. A camel-back bridge with a five ton weight limit on Woodford Drive limits access to this area from the west for vehicles exceeding a certain size and weight. During construction along River Drive it is critical that at least one lane of traffic wide enough for fire trucks and other emergency vehicles be maintained at all times to serve properties along River Drive and along Woodford Drive between the Milwaukee River and the camel-back bridge.

7. Maintaining access to the residences and businesses along River Drive, especially for emergency vehicles, during construction of the proposed sewer will be difficult. Stretches of River Road are narrow with the river on one side and a steep bank on the other. See for example Exhibit 27, pictures five and six.

8. The Town has proposed two alternate routes as alternatives for the City to serve the proposed subdivision. One alternative involves having the sewer main cross the Milwaukee River near the intersection of Greentree Road and River Road and cross undeveloped fields to the intersection with Woodford Drive and Salisbury Road. The other alternative involves constructing a sewer line in Salisbury Road. The sewer would commence at the intersection of Salisbury Road and run south to connect to the existing sewer at Babalee Drive. This alternative would require construction of a lift station and force main. The City considers these alternatives unacceptable because they will not serve the anticipated expansion of the Moraine Park Technical College campus or the Young America area. The second alternative is also unacceptable to the City because it involves the use of a lift station at a time when the City is attempting to eliminate the remaining lift stations in its system.

Although one has to question the ability of the City to maintain access while it constructs the stretch of sewer within the River Road right-of-way, the City is willing to accept this as a condition of the permit.<sup>1</sup> With this condition, the construction and maintenance of the proposed sewer main within the right-of-way of River Drive and Woodford Drive will not constitute an unreasonable obstruction to traffic on River Drive or Woodford Drive.

9 In its response to the City's Notice of Appeal, the Town alleged some of the residents have septic lines which cross River Drive. The Town was concerned that these lines might be severed during construction of the sewer. No evidence was offered at the hearing that any septic lines cross beneath River Drive or that these lines would be damaged during construction of the proposed sewer line. However, a condition of the permit is that if any septic systems are damaged, the City will repair them to at least as good of condition as prior to the construction. If there are private septic systems that may be damaged during construction of the proposed sewer line, this condition will clarify that the City is responsible for repairing the damaged caused during the construction

10 If the sewer main is constructed as proposed within the right-of-way of River Drive and Woodford Drive, it is likely that pursuant to sec. Comm 83.01(2)(b), Wis. Adm. Code, the Town landowners whose property abuts these streets will be required to connect to the City sewer

#### Applicable Law

Sections 86 16(1) and (5), Stats., provide.

(1) Any person, firm or corporation, including any foreign corporation authorized to transact business in this state may, subject to ss 30.44 (3m), 30.45 and 196.491 (3) (d) 3m , with the written consent of the department with respect to state trunk highways, and with the written consent of local authorities with respect to highways under their jurisdiction, including connecting highways, construct and operate telegraph, telephone or electric lines, or pipes or pipelines for the purpose of transmitting messages, water, heat, light or power along, across or within the limits of the highway.

(5) Any person, firm or corporation whose written application for permission to construct such lines within the limits of a highway has been refused, or has been on file with the department or local authority for 20 days and no action has been taken thereon, may file with the department or local authority a notice of appeal to the division of hearings and appeals. The department or local authority shall thereupon return all of the papers and action of the department or local authority to the division of hearings and appeals, and the division of hearings and appeals shall hear and try and determine the appeal on 10 days' notice to the department or local authority, and the applicant. The order entered by the division of hearings and appeals shall be final.

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<sup>1</sup> As discussed in the Town's brief, the City indicated at some points maintaining an open traffic lane will involve removing trees on private property and cutting into the hill on the west side of River Drive. In order to do this the City will need the permission of the property owners. If the City is unable to obtain the permission of the property owners, it will be unable to satisfy this condition of the authorization.

## DISCUSSION

The Town raised as a jurisdictional issue whether sewer mains are within the scope of sec 86 16, Stats , and argued that the DHA does not have authority to issue an order allowing the City to Construct a sewer main within the right-of-way of Town roads. The Town characterizes this issue as one of first impression. This is not accurate. The DHA and its predecessor agencies, the Transportation Commission and the Office of the Commissioner of Transportation, have issued numerous decisions under sec. 86 16(5), Stats , involving sewer mains.

The only reported case appealing a decision issued pursuant to this section, City of Appleton v. Transportation Commission, 116 Wis 2d 352, 342 N.W.2d 68 (Ct.App 1983), involved a sewer main. There is no indication that the Court of Appeals expressly considered whether sewer lines were within the scope of the section; however, the fact remains that the DHA and its predecessors has repeatedly found that sewer mains are within the scope of sec 86.16(5), Stats., and no court has ever held otherwise. Based on these precedents, the DHA has jurisdiction in this matter.

The issue in this matter is whether the construction and maintenance of the proposed sewer will result in an unreasonable obstruction to traffic on a public highway. As discussed in the Findings of Fact a concern exists whether the City will be able to maintain access for the residences and businesses along River Road during construction of the first stretch of the project. The City's engineer and the Town's consulting engineer disagreed on the feasibility of maintaining access during construction. The disagreement centered on the width of the trench necessary for this project and the type of equipment that will be needed. It is not within the scope of this agency's expertise to make engineering decisions. The bottom line is that the City is willing to accept as a condition for permission to construct the proposed sewer that it will maintain at least one traffic lane for access through the construction zone at all times.

The Town did propose alternate routes for the sewer line to serve the new subdivision east of Salisbury. The alternate routes would result in little or no obstruction of traffic on any public highways. From a perspective of simply minimizing the obstructions to traffic on public highways either of the alternate routes are obviously preferable to the route the City proposes. However, obstruction to traffic is only one factor in choosing a route for a sewer project. The route the City proposes achieves several other objectives that the City wishes to accomplish, namely serving the anticipated expansion of Moraine Park Technical College, providing sewer service for anticipated growth of the northern part of the City, and eventually eliminating the Patricia Avenue lift station. The issue to be decided is not whether the proposal minimizes obstructions to traffic, but simply whether the proposed project will result in an unreasonable obstruction to traffic. With the conditions set forth in the order, the proposed project will not unreasonably obstruct traffic on River Drive or Woodford Drive.

The Town is opposed to the project; however, it is willing to give the City permission to construct the sewer main within the right-of-way of River Drive and Woodford Drive if the Town residents who are abutting property owners are allowed to connect to the proposed sewer lines without being annexed to the City. The City has an express policy that it will not sewer properties without annexation into the City.

Precedent exists for conditioning permission for a city to construct utility mains within the right-of-way of a town road upon the city allowing the town residents whose property abuts the town road to hook-up to the city sewer and water mains. This precise condition was reviewed and approved by the court in City of Appleton v Transportation Commission, 116 Wis.2d 352, 342 N.W.2d 68 (Ct. App., 1983). The City attempts to distinguish the facts in the instant case from those in City of Appleton v. Transportation Commission. Although there may be some factual distinctions between the two cases, the primary factor the court considered in City of Appleton v. Transportation was that sec. ILHR 83.01(2), Wis. Adm. Code, required buildings on land abutting streets containing public sewers to be connected to the sewer.<sup>2</sup> This administrative requirement still exists as sec. Comm 83.01(2), Wis. Adm. Code. The rationale behind the condition requiring the City to allow town residents to hook-up to the sewer main is to avoid the unnecessary expense and highway disruption of the Town having to construct a parallel system for the town residents which would be required to hook-up to a public sewer system.

Pursuant to sec. Comm 83.01(2), Wis. Adm. Code, it is apparent that at some point the Town residents whose properties abut River Drive and Woodford Drive will be required to connect to the City's sewer system. The question is whether they will be required to annex their property to the City in order to connect. The Town argues that allowing the Town residents to hook-up to the City's sewer main without annexing to the City is a reasonable benefit to these residents in exchange for permission to construct the proposed sewer main within the right-of-way of Town roads. The City argues that this situation does not warrant an exception to its policy prohibiting it from connecting private property not within the City boundaries to its utilities without annexation.

The DHA does not have the authority to order annexation of the abutting property. Nor should the DHA unnecessarily interfere with the City policy requiring annexation prior to being allowed to connect to the City sewer system. The DHA's only concern is with unreasonable obstructions to traffic. An unreasonable obstruction to traffic will occur if, after the sewer main is constructed and River Drive and Woodford Drive are reconstructed, traffic on these streets is again interrupted for the construction of laterals to the abutting properties which are now located within the Town. Therefore, it is reasonable to order the City to construct the laterals at the same time as the sewer mains are constructed. Whether and when these laterals are connected to the buildings on the abutting properties is between those property owners and the City.

### CONCLUSIONS OF LAW

The Administrator concludes:

1. Sewer lines are within the scope of sec. 86.16(5), Stats., and the Division of Hearings and Appeals has jurisdiction in this matter.

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<sup>2</sup> Section Comm 83.01(2)(b), Wis. Adm. Code, provides

Every building intended for human habitation or occupancy on land abutting a street, right-of-way, or easement in which there is a public sewer, or on land deemed accessible to public sewer, shall have an individual connection to the public sewer and the private sewage system serving such building shall be properly abandoned

2 The proposed construction by the City of West Bend of a sewer main within the right-of-way of River Drive and Woodford Drive within the Town of Barton is in the public interest and construction and maintenance of this utility line will not constitute an unreasonable obstruction to traffic on River Drive and Woodford Drive upon compliance with the conditions set forth in the following order.

1. Pursuant to secs. 86 16(5) and 227 43(1)(bg), Stats., the Division of Hearings and Appeals has the authority to issue the following order.

### ORDER

The Administrator orders:

The Town of Barton shall grant the City of West Bend permission to construct and maintain the proposed sewer main within the right-of-way of River Drive and Woodford Drive within the Town of Barton. At the time of construction, the City shall also construct laterals up to the property lines of the properties located within the Town of Barton which abut the segments of River Drive and Woodford Drive in which the proposed sewer main will be constructed. The laterals may be capped until the properties are annexed to the City or other arrangements are made for the Town residents to receive city sewer service. During the construction of the segment, the City will ensure that at all times there is adequate access to the residences and businesses along River Drive and Woodford Drive. The access shall be of sufficient width to accommodate the emergency vehicles that service this area. The City shall indemnify the Town for any damages or injuries arising out of the construction or maintenance of the proposed utility main. After construction, the City shall restore River Drive and Woodford Drive to a condition at least as good as prior to construction. If the private septic systems of any Town residents are damaged during construction of the sewer main, the City shall be responsible for repairing any and all damage to the systems.

Dated at Madison, Wisconsin on September 13, 1999.

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